BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN W. WOOTAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,064,261
ST. FRANCIS HEALTH CENTER	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the February 28, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. Bret C. Owen, of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from August 28, 2013, with exhibits attached; the Evidentiary Deposition of Cathy McDevitt, taken November 6, 2013, and the documents of record filed with the Division.

ISSUES

The ALJ considered and denied claimant's preliminary hearing requests, finding he failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent. The ALJ found the special hazard exception does not apply in this case, stating:

> Claimant fell next to his car in a parking lot. There was nothing special or hazardous about this parking lot except it was a parking lot located in Topeka, Kansas and Claimant slipped on ice. This was not a special hazard inherent to this parking lot.

> . . . There is nothing in the record that made the parking lot or even the place more hazardous than other parking lot or area of a parking lot. Claimant was not required to park on the north side of the building where it is more likely to have ice in December in Topeka, Kansas.[1]

The ALJ also found claimant did not meet the premises exception stating:

> The key to the premises exception is that the place where an employee is injured is a place controlled by the employer.
>
> Claimant's employer in this case is St. Francis Health Center. St. Francis Health Center leases the building and the parking lot from HIL, LLC. The landlord is responsible for all maintenance of the building and parking lot including snow removal.
>
> In this case, Claimant was not injured on employer's premises. St. Francis did not control the condition of the parking lot because that was the landlord's responsibility.[2]

Claimant appeals, arguing the parking lot he was in was used exclusively by respondent and he parked where employees were supposed to park and used a specific direct route. Claimant contends the route used was the only route available to or from work, therefore the ALJ's Order should be reversed. Claimant points out that his argument is not limited to the area where he parked, but to anywhere in the lot as the entire parking lot is a route controlled by the special risk doctrine.

Respondent argues the ALJ's Order should be affirmed. Respondent asserts the accident arose out of a neutral risk with no particular employment or personal character.

The issues listed by claimant on appeal are:

> "1. Denial of medical treatment and compensability of the claim upon going and coming rule;
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> 2. Denial of related exceptions related to the going and coming rule;
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> 3. Any other issue adverse to the claimant or any adverse finding within the order or any applicable law related to an adverse finding or issue within the order as attached."[3]

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[1] ALJ Order (Feb. 28, 2014) at 10.

[2] *Id*. at 10-11.

[3] Application for Review (filed Mar. 5, 2014).

FINDINGS OF FACT

On the day of the accident, claimant worked for Topeka Urology at St. Francis. Claimant was an employee of St. Francis as Topeka Urology had been purchased by St. Francis in 2009. Prior to 2009, Topeka Urology was owned by a corporation named HIL, Inc., (HIL) and run by the three doctors at the clinic, Dr. Lui, Dr. Hsu, and Dr. Iloreta. The building claimant works in is caddy corner to St. Francis. The parking lot and respondent's building are owned by HIL. Dr. Lui is not affiliated with or employed by St. Francis. Dr. Lui's business occupies a portion of the building occupied by respondent, and his staff and patients utilize the same parking lot as respondent and its employees.

On December 27, 2012, claimant was on his way back into the building after lunch when he dropped his keys and slipped on some ice as he reached down to pick them up. He fell on his right side and heard a pop in his neck and shoulder region. Claimant's fall took place in the parking lot of the St. Francis Urology Clinic. The parking lot is adjacent to the building and there are signs indicating the lot is for employees, patients, and vendors. The lot is not open to the general public. Anyone not authorized to park in the lot is asked to move. If someone parks in this lot the only way into the building is through the lot.

Claimant testified that, on occasion, those visiting the Long John Silver's restaurant across the street and those living in the houses behind the HIL building would try to park in the lot. When this happened, they would be asked to move their vehicles or be subject to having their vehicles towed. This lot provided claimant with a direct route to the back door, which employees used to enter the building. The patients use the front door. However, claimant acknowledged that people from the general public, not doctors, patients or vendors would sometimes park in the lot.

Claimant reported his accident to Cathy McDevitt and was told that it probably wouldn't matter because he was off the clock. Claimant went ahead and filled out an accident report, but his claim was denied. He sought medical treatment on his own.

Claimant saw Dr. Sethi, who suggested an MRI. He also saw Dr. Ebeling, a neurosurgeon, who reviewed the MRI and determined claimant needed a discectomy. Claimant did not have surgery, but instead had physical therapy. He later saw Dr. Zimmerman and Dr. Sankoorikal.

Cathy McDevitt, Clinic Manager for respondent, testified Topeka Urology is owned by St. Francis Health Center and rents office space. The parking lot the clinic utilizes is owned by HIL, the company that leases the office space to respondent. The parking lot goes around the entire building and is maintained by the landlord through Athan's Landscaping.

Jerry Behrends was hired by HIL and has been the building maintenance man for the last 6 to 8 years. Mr. Behrends comes around once a week to change light bulbs, hang pictures, sweep sidewalks and, when pertinent, clear snow from the sidewalk. Athan's provides snow removal in the parking lot. Ms. McDevitt indicated that Dr. Hsu and Dr. Iloreta, in their role as part of the landlord company, assume part of the duty for control of the parking lot. All maintenance issues are reported to Colleen Newell, the building manager out of Texas. Ms. Newell then contacts Mr. Behrends or Athan's.

Ms. McDevitt is familiar with the area of the parking lot where claimant alleges he fell and confirmed that the area is owned and maintained by the landlord, HIL. She testified that patients, patrons of Long John Silver's and residents of the houses on the north side all park in the lot. She testified that patients of Dr. Lui, who is not affiliated with respondent, also park in the lot. There are no specific designated parking spots. Those not allowed to park in the lot are asked to move and are sometimes towed at the discretion of the landlord. Signs posted in the parking lot read "HIL Parking Only."

Ms. McDevitt testified that the back door claimant referred to in his testimony is nowhere near where he fell. The back door is located on the east side of the building and the parking lot is on the north side of the building. The back door is for employees only. However, the door is not marked to indicate this. There is no required area for employees to park. Claimant did park in the closest area he could to the back door. Claimant was not on the clock at the time of the accident. He was on his lunch break.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

> (B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee

> occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Generally, if an employee is injured while on his or her way to assume the duties of employment or after leaving such employment, the injuries are not considered to have arisen out of and in the course of employment under K.S.A. 2012 Supp. 44-508(f)(3)(B). This rule is known as the "going and coming" rule.[4] The rationale for the "going and coming" rule is explained in *Thompson*[5]: "[While on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. [Citations omitted.]"[6] "[The] question of whether the 'going and coming' rule applies must be addressed on a case-by-case basis.' [Citation omitted]"[7]

K.S.A. 2012 Supp. 44-508(f)(3)(B) is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[8]

K.S.A. 2012 Supp. 44-508(f)(3)(B) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[9]

A significant dispute exists in this matter as to whether claimant was on respondent's premises. The parking lot was actually owned by HIL, a separate entity from

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[4] *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, aff'd 258 Kan. 653 (1995).

[5] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[6] *Id.* at 46.

[7] *Chapman v. Beech Aircraft Corp.* at 964.

[8] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. 1, 416 P.2d 754 (1966).

[9] *Thompson*, 256 at 40.

respondent. The control, supervision and maintenance of the parking lot rested with HIL. None of respondent's employees had any responsibility to maintain the parking lot for any reason. Claimant argues the parking lot was used exclusively for respondent, its doctors, patients and vendors. However, a separate entity also inhabited the building. Dr. Lui had a separate practice, occupied a portion of the building, and his staff, patients and vendors were also allowed to park in the lot used by claimant and respondent's other employees. This Board Member does not find the parking lot to be respondent's premises or under respondent's control.

Respondent argues that tenants of the nearby houses and Long John Silver's also parked in the parking lot. However, it was clear from this record that HIL, the owner had posted signs prohibiting parking by those other than persons authorized to use the lot, and owners of unauthorized vehicles would be asked to leave, or have their vehicles towed.

Another exception to the "gong and coming" rule is when the worker is injured while using the only available route to or from work, involving a special risk or hazard and the route is not used by the public, except when dealing with the employer.[10]

Claimant contends the parking lot, and the path into the building constitutes a special risk or hazard because of the ice claimant slipped on. The language of the statute requires the special risk or hazard to first be connected with the nature of the employment. That is not the case here. Additionally, the special risk or hazard must be a risk or hazard to which the general public is not exposed and is on a route not used by the public except in dealings with the employer. Here, the risk of ice is a general risk shared by the general public living and working in the area of this building. Additionally, as noted above, this parking lot is utilized not only by respondent but also by Dr. Lui. Thus, it is not a route exclusive to respondent.

The Order of the ALJ, denying claimant benefits in this matter is affirmed for the above discussed reasons.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[10] *Id.*

[11] K.S.A. 2013 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant was on his lunch break, had not returned to work and was not on respondent's premises at the time of the accident. The fall did not occur on a route exclusive to respondent, and the risk of the ice was shared by the general public in this area.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 28, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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